BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets	)	WT Docket No. 00-230
	)	
	)	
	)	

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

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February 9, 2001

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Winstar Communications, Inc. ("Winstar"), by its attorneys, hereby submits these Comments in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY.

Winstar supports the Commission's efforts in the Notice to promote secondary markets for Wireless Radio Services. Winstar is a nationwide, facilities-based, competitive fixed wireless carrier with FCC licenses in a number of bands in the Wireless Radio Services, including the 28/31 GHz ("LMDS") and 38.6-40.0 GHz ("39 GHz") bands. While Winstar currently may lease portions of its spectrum pursuant to the Commission's present policies, the proposals in the Notice, if adopted, will provide additional flexibility in the secondary use of Winstar's spectrum.

The Commission's Policy Statement[2] and Notice provide both policy and legal bases to adopt secondary markets policies that encourage licensees to enter into more flexible arrangements with third parties that will lead to more efficient use of spectrum. As the

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1 In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Notice of Proposed Rulemaking, WT Dkt. No. 00-203 (rel. Nov. 27, 2000) ("Notice").

2 In re Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets, Policy Statement (rel. Dec. 1, 2000) ("Policy Statement").

Commission has made clear, this is critically important for the implementation of advanced services.[3] The adoption of a leasing policy for Wireless Radio Services would formalize and improve upon numerous instances in which non-licensees are permitted to make significant use of the spectrum.

The FCC's Notice has the potential to provide licensees with much-needed flexibility to structure lease (and other secondary) arrangements with third parties to develop and use spectrum that otherwise would be underutilized. However, in adopting its secondary markets proposal, the FCC must ensure that its ability to prevent interference is not hindered, and that the FCC does not inadvertently permit other services to gain "improved" access to a band to which they currently have limited access due to interference issues. The value of Wireless Radio Licenses depends largely upon the spectrum being unimpeded by interfering uses. It is important that new policies adopted by the FCC concerning the use of spectrum continue to ensure that harmful interference will not occur, and that the bands will continue to be primarily designated for Wireless Radio Services.

In addition, the Commission must not impose self-defeating regulations on leasing. For example, the FCC should permit licensees and lessees to determine through negotiations which party will coordinate the spectrum; license or register the equipment; install and operate the equipment; be the liaison to the FCC; pay regulatory and universal service fees; and make filings with the FCC. Moreover, the regulatory regime must allow multiple varieties of spectrum usage

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[3] See In re Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems, Notice of Proposed Rulemaking and Order, ET Dkt. No. 00-258, RM-9920, RM-9911, ¶ 13 (rel. Jan. 5, 2001) ("As indicated in the *Policy Statement*, a flexible allocation approach will allow licensees freedom in determining the services to be offered and the technologies to be used in providing those services. . . . We also believe that this approach will provide a sufficient amount of spectrum to ensure a robust and competitive market in the provision of these advanced wireless services.") ("Third Generation Notice")

rights and leases to be employed, as long as basic emission requirements and interference rules are not abrogated. As noted by the FCC, secondary markets can provide efficiencies and innovation, but market forces must be allowed to work. Thus, in determining what rules and regulations should apply to a leasing policy, the FCC must consider whether its proposals will hinder secondary market forces.

Specifically, Winstar is concerned with the FCC's proposal that licensees will be held ultimately responsible for all actions of lessees. Such a policy discourages licensees from entering into long-term secondary arrangements and, therefore, will operate to the detriment of secondary markets. Instead, the FCC should hold lessees directly responsible for complying with the Communications Act and the FCC's rules and policies. As demonstrated below, the Act provides direct jurisdiction over lessees using transmitting radio stations, and that is enough.

In addition, the proposed "control" test for purposes of Section 310(d) will restrain secondary markets. The Commission should find that licensees that have entered into secondary arrangements are in compliance with Section 310(d) if they retain *de jure* control of the license; notify the FCC concerning the lessee's/sublessee's identity and contact information; and meet a reasonable standard of care for the license (i.e., do not enter into a lease knowing the lessee will use the spectrum for unlawful purposes).

Moreover, the FCC should not apply its eligibility and qualification rules to lessees. In doing so, the Commission will only limit secondary arrangements to the disadvantage of both consumers and carriers. It is not necessary to promote entrepreneurs or small businesses as licensees. The Commission's rules already advance that purpose. The FCC should provide all licensees the same opportunities to use their licenses. Moreover, the FCC should only attribute the spectrum to the lessees in long-term leasing situations for purposes of its attribution rules.

The adoption of secondary markets policies confirms that the Commission need not concern itself with construction requirements for wireless licensees. Through competitive bidding, partitioning, disaggregation, and other approaches, the FCC has provided the flexibility for the market to determine the development and use of spectrum. Since, as the Commission correctly has concluded, demand can be trusted to move the spectrum to more valuable uses, demand and normal profit incentives can be trusted to induce construction as soon as it is practicable. As a result, the FCC's construction requirements are no longer needed to ensure that licensees will develop and use their spectrum.

II. THE PUBLIC INTEREST IS SERVED THROUGH THE LEASING OF SPECTRUM.

In the Notice, the FCC proposes:

> to allow licensees greater flexibility, consistent with the public interest and statutory requirements, to subdivide and apportion the spectrum and to lease their rights to use it to various third party users - in any geographic or service area, in any quantity of frequency, and for any period of time during the term of their licenses - without having to secure prior Commission approval.[4]

Winstar fully supports the FCC's leasing proposal for Wireless Radio Services. It will further permit market forces to determine the development and use of spectrum; it will allow licensees greater flexibility in developing and using spectrum; and it will reduce the transaction costs of licensees who lease spectrum to or from third parties.[5]

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[4] Notice ¶ 20.

[5] See Gregory L. Rosston and Jeffrey S. Steinberg, "Using Market-Based Spectrum Policy to Promote the Public Interest," 50 Fed. Comm. L. J. 87, 93 (1997) ("[T]he Commission should, wherever possible, rely on market forces to ensure economically efficient use of spectrum. In a perfectly competitive market, firms will produce the combination of goods and services most desired by consumers in the most efficient manner, and will offer these goods and services at competitive prices. In this way, the market achieves technological and allocative efficiency.") ("Rosston & Steinberg").

The FCC has promoted market-based spectrum policies in various ways over the years. For example, the FCC has permitted radio and television broadcasters to provide network programming on their stations and to enter into local marketing and management agreements with third parties. And, as noted by the FCC, satellite operators may lease or sell transponders; Instructional Television Fixed Service licensees may lease excess channel capacity to Multipoint Distribution Service operators; and Private Land Mobile Radio Services licensees may share the use of their facilities with unlicensed operators.[6] In recent years, more formally through the competitive bidding process and the options for some wireless licensees to partition or disaggregate their spectrum, the FCC has permitted market forces to determine the assignment of licenses. Nevertheless, these options typically contemplate that the user of the spectrum will hold the FCC license, and they require that the FCC approve the license assignment. The adoption of a leasing policy is the next sensible step to further promoting the use of spectrum based on market demands. By permitting licensees to enter into lease arrangements for the use of their spectrum without requiring prior FCC approval, the FCC is giving licensees additional options to put its spectrum to use. This additional flexibility for licensees will permit spectrum to be used by third parties, without requiring licensees to permanently assign their licenses or obtain FCC authority.[7] Thus, by adopting a leasing policy, licensees seeking to allow third parties to use their spectrum will face fewer uncertainties and lower transaction costs, thereby encouraging them to enter into lease arrangements where economically warranted.

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[6] See Notice ¶ 16.

[7] See Rosston & Steinberg, at 99 ("Flexibility eliminates artificial market entry barriers by enabling spectrum users to respond quickly to changing public demands for new and different services, as well as enabling users to introduce innovative services and technologies rapidly without administrative costs or delays. Furthermore, flexibility increases users' incentives to expand spectrum capacity by enabling them to profit from investments in more efficient use of spectrum, either by using spectrum for additional purposes or by transferring the authorization to use part of the spectrum to a party that values it more highly.").

The FCC's leasing policy is entirely consistent with the Coase Theorem which has engendered many beneficial regulatory reforms over the last four decades.[8] It posits that market forces will drive resources to their highest and best use regardless of their initial placement, provided that government regulations do not hinder such movement. Coase argued that, "the allocation of resources should be determined by the forces of the market rather than as a result of government decisions."[9] Clearly, the FCC's leasing proposal, once adopted, will permit market forces to work more freely than under the FCC's current regime. The leasing policy will promote the public interest as it will allow the spectrum to move toward its highest and best use.

III. LONG-TERM LESSEES MUST BE RESPONSIBLE FOR COMPLYING WITH THE COMMISSION'S RULES AND POLICIES.

The Commission proposes that when licensees lease their spectrum, they would remain "ultimately responsible to the Commission for compliance with all of the obligations of the Communications Act and our rules."[10] As recognized in the Notice, there are many types of leases that licensees may enter into with third parties. For example, licensees may have a short-term lease of excess capacity on their own systems or a long-term lease of raw spectrum. Where a lease involves only a short-term arrangement to use excess capacity of a wireless system, the FCC's proposal that the licensee would remain "ultimately responsible" for compliance with the Act and the FCC's rules and policies may be appropriate. However, where there is a long-term lease and the lessee is operating the radio equipment, the lessee should be responsible for its own

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8 See generally R. H. Coase, The Federal Communications Commission, 2 J. L. & Econ. 1 (Oct. 1959) (arguing in favor of market forces to allocate licenses).

9 Id. at 18.

10 Notice ¶ 29.

actions. The licensee should be absolved of responsibility for actions taken by the lessee that violate the Act and the FCC's rules or policies.

If the FCC holds licensees "ultimately responsible" for the actions of lessees, it inevitably will diminish the licensees' incentives to lease spectrum to third parties. That, in turn, will prevent at least some welfare-enhancing leases from being concluded. While contract terms, such as indemnification clauses, may be negotiated between licensees and lessees to deal with "responsibility" issues, the enforcement of such terms are uncertain, and licensees will have to weigh the regulatory risks involved in leasing (i.e., could they lose their licenses if potential lessees violate the Act or rules) with the commercial opportunities of leasing. Indeed, requiring licensees to be "ultimately responsible" for the actions of lessees would impose an obligation on licensees to engage in on-going "due diligence" activities to ensure that lessees are in compliance with the FCC's rules and policies.[11] To require this would be self-defeating.

Moreover, if the licensees are "ultimately responsible," then licensees will have to rely upon contract terms to enforce the FCC's rules. The practical consequences of this state of affairs no doubt impelled the Commission's -- entirely correct -- statements here and elsewhere that it has direct jurisdiction over unlicensed lessees.[12] The Commission's most fundamental Title III obligation is the prevention of radio interference.[13] The obligation is best, and perhaps only effectively met, if the Commission maintains control over both the substance and, especially, the process governing radio interference claims. The matter is too important to be left

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11 See id. ¶ 30.

12 See, e.g. id. ¶¶ 40 & 48; see also In re Service Rules for the 746-764 and 776-794 MHz Bands, and Revisions to part 27 of the Commission's rules, Second Report and Order, 15 FCC Rcd 5299, ¶ 17 (2000).

13 47 U.S.C. §§ 301, 302 & 303(f).

entirely to the vagaries of private contract provisions enforced by civil litigation. And, as the Notice acknowledges, it need not be.

Pursuant to Section 2 of the Act, the FCC has jurisdiction over lessees that are using transmitting radio equipment, and it has the authority to hold them directly responsible for their actions. Specifically, the Communications Act applies to all "interstate and foreign communication by wire or radio" and "all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations . . . ."[14] As such, the FCC's jurisdiction over lessees engaging in the transmission of radio signals is clear.[15] Accordingly, the FCC has the jurisdiction and authority to hold long-term lessees using radio equipment directly responsible for their own actions.

Consistent with this approach, the FCC may want to require licensees that enter into lease agreements (and subleases) to notify the Commission of: (1) the licenses/spectrum to which a lease or sublease applies, and (2) the contact information for the lessee/sublessee. Similar to the FCC's post-notification requirements for *pro forma* transfers of control,[16] this information can be provided promptly after the lease is entered into with the third party. Such information will allow the FCC to communicate directly with the lessee/sublessee concerning the operation of its radio equipment and any other issues the FCC may have with the lessee, including enforcement matters.

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14 47 U.S.C. § 152.

15 Part 15 of the FCC's rules also clearly establishes that the FCC has jurisdiction over operators using radio frequency devices.

16 See In re Federal Communications Bar Association's Petition for Forbearance from Section 310(d), Memorandum Opinion and Order, 13 FCC Rcd 6293, ¶¶ 32-33 (1998).

Finally, the Commission must permit licensees and lessees as much flexibility as possible to structure secondary arrangements to allow various uses of spectrum, as long as those arrangements are consistent with the FCC's basic emission requirements and interference rules. The FCC must permit licensees and lessees to negotiate their own requirements so that the parties determine who will be responsible for, among other things, coordinating the spectrum and paying regulatory and universal service fees.

IV. THE *INTERMOUNTAIN MICROWAVE* FACTORS ARE NO LONGER RELEVANT FOR DETERMINING WHETHER A *DE FACTO* TRANSFER OF CONTROL OF A LICENSE HAS OCCURRED DUE TO A LEASE OF SPECTRUM.

The FCC defines "control" for purposes of Section 310(d).[17] The Commission has held that Section 310(d) requires that a licensee have both *de jure* and *de facto* control of a license. Over time, the FCC has defined *de facto* control in different ways for different services. The courts have had numerous occasions to review transfers of control, but we are unaware of any decision that limits the Commission's ability to construe Section 310(d). Rather, the courts have focused on whether the Commission's decisions were consistent with its construction of the statute and on whether the underlying facts of "control" cases supported the FCC's conclusions. In one such case, Telephone and Data Systems v. FCC, the U.S. Court of Appeals for the D.C. Circuit found that the FCC had not adequately explained the support for its findings that control had not occurred based on the FCC's *de facto* control standard -- the *Intermountain Microwave* factors. However, the court stated that the FCC "may overrule or limit its prior decisions by advancing a reasoned explanation for the change, but it may not blithely cast them aside."[18]

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[17] See Notice ¶ 71 ("Congress left the task of defining 'control' to the Commission . . . .").

[18] 19 F.3d 42, 49 (D.C. Cir. 1994).

Thus, the FCC may change its requirements for control for 310(d) purposes; however, it must provide a reasoned basis for doing so.

Winstar agrees with the FCC's tentative conclusion that the *Intermountain Microwave* factors are too restrictive for certain leases of spectrum. Those factors focus on the operation of facilities by licensees and may prohibit leases where lessees would operate their own equipment using licensees' assigned spectrum. They are counterproductive at a time of serious spectrum shortage[19] and should not be used for determining whether a lease causes a *de facto* transfer of control for purposes of Section 310(d).[20] However, the FCC's proposed *de facto* control test for leases contains provisions that will place undue restraints on licensees' ability to enter leases, and as a result, will restrain secondary markets.

The FCC proposes that a wireless licensee entering into a spectrum lease arrangement will retain *de facto* control of its license if it:

> (1) retain[s] full responsibility for compliance with the Act and our rules with regard to any use of licensed spectrum by any lessee or sublessee; (2) certif[ies] that each spectrum lessee (or sublessee) meets all applicable eligibility requirements and complies with all applicable technical and service rules; [and] (3) retain[s] full authority to take all actions necessary in the event of noncompliance, including the right to suspend or terminate the lessee's operations if such operations do not comply with the Act or Commission rules.[21]

This proposal is so heavily qualified that it will discourage beneficial leases, and unnecessarily so. As discussed above, requiring licensees to retain full responsibility for their lessees' actions imposes extraordinary responsibilities and concomitant risks upon licensees. This predictably

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19 See Policy Statement ¶ 3; Third Generation Notice ¶ 12.

20 See Notice ¶ 76.

21 Id. ¶ 79.

will reduce the incidence of leasing and thus reduce the badly needed improvements in spectral efficiency. Likewise, requiring licensees to make certifications regarding the lessee's eligibility and compliance with the FCC's rules will require licensees to independently determine whether lessees comply with the FCC's rules, a strange proposition at a time when the agency is attempting to rely more on ex post enforcement and less on ex ante requirements to protect the consuming public. The FCC should not adopt the *de facto* test it has proposed.

It appears that the FCC is attempting, through licensee-lessee contract requirements, to impose the licensee's requirements on lessees derivatively. Such an approach is not necessary when the FCC has jurisdiction over lessees pursuant to Section 2 of the Act. The imposition of detailed requirements on commercial transactions leads only to inflexibility and inefficiencies.

Under Section 310(d), it should be sufficient for licensees to retain *de jure* control of their licenses and to notify the FCC that a lessee/sublessee is using the spectrum. In addition, the Commission should hold licensees to a reasonable standard of care with respect to their licenses. For example, if the licensee knew or should have known that the lessee intended to make improper use of the spectrum, such as for criminal purposes or to cause harmful interference to other operators, yet entered into the lease, the licensee could be found to have relinquished its licensee responsibilities and transferred control of its license in violation of Section 310(d). Likewise, if the licensee has actual knowledge of impermissible activity by its lessee/sublessee and fails to take prudent measures to prevent them or to report the matter to the Commission, the licensee could be found to have abdicated its responsibilities as a licensee and transferred control of its license in violation of Section 310(d).

Alternatively, the FCC has the authority and, in these circumstances, the responsibility to determine that leases of spectrum are consistent with the public interest and forbear from

applying Section 310(d). Section 10 of the Act requires the Commission to forbear from applying a provision of the Act to a telecommunications carrier if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest.[22]

Application of Section 310(d) to spectrum leases is not necessary to ensure that carriers engage in just, reasonable, and nondiscriminatory conduct because the market for wireless services is competitive. In addition, the Commission has direct authority over lessees and sublessees in order to prevent unreasonable or discriminatory conduct by such entities. Consumers will benefit from the forbearance of Section 310(d) on secondary arrangements as spectrum will be made available to parties who will then be able to provide additional competitive wireless services to consumers. Finally, spectrum leasing will promote the public interest by encouraging efficient spectrum use and by allowing existing licensees to secure needed spectrum and by allowing new entities to gain access to spectrum.[23] Thus, forbearance from enforcing Section 310(d) to spectrum leases is justified.

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[22] 47 U.S.C. § 160(a)(1)-(3).

[23] Notice at ¶ 18; see also Section II, supra.

V. THE FCC'S INTERFERENCE, FREQUENCY COORDINATION, AND TECHNICAL RULES SHOULD APPLY TO LESSEES.

The FCC requests comment on whether lessees should be required to follow the same interference, frequency coordination, and technical rules as licensees.[24] The FCC's service rules governing interference issues should apply to lessees. For example, those lessees using 39 GHz spectrum would follow the technical and operational requirements for 39 GHz licensees found in Part 101 of the FCC's rules. Where the service rules provide flexibility to licensees, such as allowing licensees to choose to operate as a common carrier or a non-common carrier, the FCC should permit lessees to enjoy the same flexibility.

VI. IF THE FCC'S ELIGIBILITY AND QUALIFICATION RULES ARE APPLIED TO LESSEES, SECONDARY MARKETS WILL BE CONSTRAINED.

The FCC requests comment on whether its eligibility and qualification rules should apply to lessees.[25] Those rules should not apply to lessees because they will only serve to limit leasing options, thereby restricting the benefits derived from secondary market transactions.[26] Rosston & Steinberg state, "[t]he Commission generally should not impose eligibility restrictions unless they are clearly necessary to prevent a party from developing or retaining market power (i.e., the ability to control or significantly influence price)."[27] The Wireless Radio Services subject to this rulemaking are highly competitive. Eligibility restrictions are not needed to prevent anticompetitive activities.

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24 See Notice ¶¶ 35-40.

25 See id. ¶¶44-47.

26 See Rosston & Steinberg, at 97 ("In particular, the Commission should strive to reduce barriers to entry by eliminating restrictions on eligibility wherever possible.")

27 Id.

To the extent that the FCC is attempting to encourage entrepreneurs, small businesses, or minorities to become licensees of spectrum, the FCC's rules already accomplish that. The FCC should permit these licensees to exploit the full value of their licenses, including leasing their spectrum without eligibility restrictions attached. Indeed, some licensees that obtained licenses as designated entities at auctions, no longer qualify as designated entities because their revenues have increased; however, they are still eligible to hold and use the licenses they won at auction. Such licensees should not be restricted from leasing their spectrum to third parties when they themselves are not restricted from using the spectrum. To require otherwise would only result in the restraint of secondary market forces.

VII. FOR PURPOSES OF ITS ATTRIBUTION RULES, WHEN A LICENSEE ENTERS A LONG-TERM LEASE, THE COMMISSION SHOULD ATTRIBUTE THE LESSEE WITH THE SPECTRUM.

The FCC also requests comment on how its attribution and spectrum aggregation limits should apply when licensees enter into leases for use of their spectrum.[28] If the FCC determines to apply its eligibility and qualification rules to leasing situations, the FCC's attribution rules should only apply to the actual user of the spectrum. Thus, where a licensee is leasing its spectrum, only the lessee should be attributed with that spectrum for purposes of the Commission's eligibility and qualification rules.[29]

The FCC's attribution and aggregation rules are intended to promote competition. Specifically, the FCC's attribution rules look to who "controls" the licensee of the spectrum for

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[28] Notice ¶¶ 48-49.

[29] Upon the adoption of the FCC's leasing policy, it is likely that a "spot market" will develop for spectrum. That is, some entities may enter into secondary arrangements or become licensees solely for the purpose of leasing spectrum to users who need it on a short-term basis. If such entities are attributed with the spectrum, a spot market may not develop as efficiently and effectively as it would if the actual users of the spectrum are attributed with the spectrum.

purposes of determining the application of its eligibility and qualification rules.[30] This permits the Commission to determine if a single entity commands enough capacity to make it profitable to restrict output to increase price. However, where a lessee is using the spectrum on a long-term basis, the licensee will not be able to "control" output (unless it has retained that right in the lease). Thus, the lessee is the entity with which the FCC should be concerned, and the lessee's interest should be attributed, not the licensee.[31]

VIII. THE ADOPTION OF THE FCC'S LEASING POLICY CONFIRMS THAT CONSTRUCTION AND SERVICE REQUIREMENTS ARE NOT NECESSARY TO ENSURE THAT SPECTRUM WILL BE DEVELOPED AND USED BY LICENSEES.

In its Notice, the FCC asks whether lessees will build out facilities if leases are for short periods of time. The FCC also asks if it matters whether spectrum leasing involves leasing excess capacity on a licensee's system versus raw spectrum.[32]

The Commission currently requires wireless licensees to meet construction requirements to maintain their licenses, or in some cases, to receive renewal of their licenses. For some wireless licenses, the FCC requires licensees to demonstrate "substantial service" at renewal to meet their construction requirement.[33] The purpose of the Commission's construction

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30 See 47 C.F.R. § 1.2110(b)(4).

31 Similarly, where a licensee has entered into a long-term lease of its spectrum with a third party, the licensee will not have "control" of the spectrum and cannot exercise market power. Thus, for purposes of applying spectrum aggregation limits, the FCC need only count the interests of the lessee.

32 Notice ¶ 23.

33 Substantial service is defined as "service which is sound, favorable, and substantially above a level of mediocre service which just might minimally warrant renewal." See, e.g., 47 C.F.R. § 22.940(a)(1)(i). Winstar filed comments in the FCC's Biennial Review 2000 Docket, demonstrating the need for the FCC to review the substantial service test as applied to some Part 101 fixed wireless licensees. See generally Comments of Winstar Communications, Inc., In re Biennial Regulatory Regulatory Review 2000, CC Dkt. No. 00-175 (filed Oct. 10, 2000). Nonetheless, as discussed further below, it noted in its comments that

requirements is to ensure that licensees do not warehouse spectrum, but rather that they develop and use the spectrum to serve the public.[34]

However, in a market-driven regime, where, through auctions, disaggregation and partitioning policies, and now leasing arrangements, spectrum is placed in the hands of users that value it the most, construction requirements are not needed to give licensees the incentive to build out and serve consumers. Indeed, it should be noted that every licensee has the incentive to provide service whenever profits can be derived.[35] The Notice effectively recognizes this reality. Construction regulations should not be necessary when the FCC uses market-based spectrum policies because the spectrum will be developed and used as the market demands. In other words, by adopting a policy that permits licensees to lease their spectrum to third parties, the FCC is relying upon demand to determine the development and use of spectrum.[36] The FCC

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construction requirements are not necessary when the Commission uses market-based spectrum policies. Id. at n. 19.

34 See, e.g., In re Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Report and Order, 12 FCC Rcd 18600, ¶ 42 (1997) (explaining that the construction requirement adopted -- the substantial service test -- "will permit flexibility in system design and market development, yet provide a clear and expeditious accounting of spectrum use by licensees to ensure that service is indeed being provided to the public.").

35 See Fresno Mobile Radio, Inc. v. FCC, 165 F.3d 965, 969 (D.C. Cir. 1999) (explaining that elementary economic principles mandate that "a rational licensee [regardless of how it obtained its license] will voluntarily put its spectrum into service only when the additional revenue it expects to earn from doing so exceeds the additional cost it must incur to do so."). See also Rosston & Steinberg, at 101 ("[T]he Commission should generally eliminate requirements for licensees to build out their networks within a specified period of time. By permitting licensees to allow spectrum to remain unused where it is economically efficient to do so, the Commission can make it possible for market forces to govern the rate at which spectrum is developed, and eliminate the need to rely on administrative judgment regarding when spectrum should be released.").

36 If the Commission continues to requires licensees to meet construction requirements, licensees must be given the requisite flexibility to use their own actions and the actions of the lessees using their spectrum to demonstrate their satisfaction of such requirements. See Notice ¶ 50.

should repeal its construction requirements for Wireless Radio Services,[37] including its substantial service test for renewal.[38]

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[37] Under these circumstances, it would be appropriate for the Commission to review forbearing from the requirements of Section 309(j)(4)(B) which states that the FCC must impose performance requirements upon licenses granted through a competitive bidding process. See 47 U.S.C. § 309(j)(4)(B) & § 160(a).

[38] As discussed by Rosston & Steinberg, a competitive market must have administrative certainty to function effectively and efficiently. See Rosston & Steinberg, at 111-112. A renewal expectancy for licensees encourages them to invest in and develop their spectrum. Where a licensee is leasing its spectrum, the Commission should consider whether the licensee complied with the applicable FCC rules and policies in the leasing of its spectrum and has not otherwise engaged in substantial, relevant misconduct in determining whether the licensee is eligible for a renewal expectancy.

IX. CONCLUSION.

Winstar respectfully requests that the Commission adopt a leasing policy for Wireless Radio Services consistent with its comments made herein.

Respectfully submitted,

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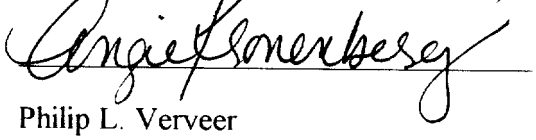
By: 

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February 9, 2001

CERTIFICATE OF SERVICE

I, Angie Kronenberg, do hereby certify that on this 9th day of February 2001, copies of the foregoing Comments of Winstar Communications, Inc. were delivered by hand, to the following parties:

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